

Jurisdictions Continue to be Split Over Insurer's Right to Recoup Defense Costs, Reuters

By Michael Zigelman, co-managing partner of KD's New York City and Westchester offices and chair of the general liability coverage practice, Eric Stern, partner and co-deputy chair of the data privacy & cybersecurity practice, and Andrew Lipkowitz, KD insurance coverage litigation attorney.

June 29, 2021 - A standard feature of CGL policies is the duty to defend, which obligates insurance companies to defend an insured even if there is ultimately no duty to indemnify. As a matter of law, the duty to defend is broader than the duty to indemnify, and an insurer's duty to defend is triggered as long as there is a "reasonable possibility" that the insurer may have to indemnify the insured under the policy. Oftentimes, the insurer has no duty to indemnify.

Jurisdictional authority is split on the question of whether an insurance company can recoup defense costs paid on behalf of an insured when it is subsequently determined that there was no duty to defend. This article will discuss some of the recent decisions illustrating the different views that Courts have taken with respect to this issue, as well as the implications for insurance companies that issue duty to defend policies.

*On March 11, 2021, the Nevada Supreme Court, in a 4-3 decision, held in *Nautilus Insurance Company v. Access Medical, LLC*, 2021 WL 936076 (Nev. 2021) that an insurance company is entitled to reimbursement of defense costs where a determination is ultimately made that the insurer did not owe a duty to defend, and the insurer expressly reserved its right to seek recoupment. The Court held that insurers are entitled to recoupment even where the policy at issue does not expressly provide such a right.*

*In *Nautilus*, the insureds were sued in California state court by a former business partner asserting numerous claims, including interference with prospective economic advantage. The insurer, *Nautilus*, agreed to defend the suit while also reserving its rights to disclaim coverage and obtain reimbursement of defense costs if it was determined that *Nautilus* did not owe a duty to defend. *Nautilus* also simultaneously commenced a declaratory judgment action in federal court seeking a declaration that it did not owe a duty to defend because the underlying action did not allege "personal and advertising injury."*